PAROL WAIVER UNDER THE NEW YORK FIRE POLICY.

The common law rule that when a contract has been embodied in written form, oral testimony shall not be allowed to vary its terms, is generally conceded to be important. The welfare of the community imperatively demands that some method shall be provided whereby rights and obligations of contracting parties may be freed from the uncertainties of oral testimony and given a precise and enduring expression. Expected oral testimony is subject to obliteration at any moment by the occurrence of death. Witnesses, especially when under the pressure of self interest, not infrequently are disingenuous, and, though honest, the occupant of the witness chair is so apt to disclose, in matters of detail, a colored recollection, a fickle and unreliable memory, that rarely indeed could the prudent business man, whether insurer or insured, be content to leave his lengthy and complicated stipulations, such as must be contained in the usual contract of insurance, without the sanction of a written formula. If both parties to the contract are businesslike and honorable, the immutable record of what they have done in the course of their business transaction should safeguard the reasonable interests and inure to the reasonable benefit of both.

This fundamental rule of evidence was early recognized and applied by the courts in connection with the law of insurance. In 1808 the English Court of Common Pleas declared

"that it would be of the worst effect if a broker could be permitted to alter a policy by parol accounts of what passed when it was effected."[1]

In an action of assumpsit before the highest court of Massachusetts the policy sued on described the vessel containing the insured property as "Spanish." In fact she was, and was known by both parties at the time they entered into their contract to be, American, being designated in the policy as Spanish simply for the purpose of avoiding capture by the enemy; nevertheless the court affirmed a nonsuit, and by its opinion rendered in 1817 ruled that "parol evidence of what was within the knowledge of the underwriters was not admissible."[2]

In 1842 a similar question was similarly decided by the U. S.

[1]Weston *v.* Emes (1808) 1 Taunt. 115, 117.

[2]Atherton *v.* Brown (1817) 14 Mass. 152, 154.

Supreme Court. The policy of fire insurance upon which an action at law had been brought, forbade other insurance without notice to the company and without its endorsement of consent thereto. The plaintiff, when applying to the defendant for insurance, in fact had in his possession a prior policy issued by another company, and, while he claimed that the defendant had been informed of this circumstance, it appeared that no endorsement of consent had actually been made upon the policy in suit. The court was asked to instruct the jury that if the defendant had notice of the existence of the other policy such notice amounted in law to a compliance with the terms of the defendant's policy. The trial judge, however, refused the plaintiff's prayer, and instructed the jury that at law, whatever might be the case in equity, mere parol notice of such insurance was not of itself sufficient to comply with the requirements of the policy. The highest court by Justice Story approved the instruction and affirmed the judgment in favor of the defendant.[3]

In a case in New York, decided a little later, the insured had in substance warranted by his policy that there was no other building within ten rods of the insured grist mill. In fact, a barn stood within five or six rods of the mill, but this circumstance was explained by the insured to the agent of the company at the time the written application for the insurance was signed. The agent, with full knowledge of the situation, gave the insured distinctly to understand that the matter was immaterial, and that there was no occasion for making any mention of the barn in the application. Indeed, the application was filled up by the agent himself. The learned court was impressed with this aspect of the case and remarked, "here the mistake is proved to have been the consequence either of the ignorance, carelessness, or bad faith of the agent of the defendants;" nevertheless the court decided that it was fatal error to admit testimony in favor of the insured as to the facts above narrated and granted a new trial in favor of the defendant.[4]

[3]Carpenter *v.* Providence Wash. Ins. Co. (1842) 16 Pet. 495.

[4]Jennings *v.* Chenango Co. Mut. Ins. Co. (N. Y. 1846) 2 Denio 75. The court at p. 83 frankly expresses its fear that in this case an enforcement of the technical doctrine of warranty may have occasioned injustice, but the case and its doctrine were subsequently approved by the New York Court of Appeals in Brown *v.* Cattaraugus Co. Mut. Ins. Co. (1858) 18 N. Y. 385, 390, where the court says of the plaintiff's contention: "If the doctrine of estoppel could have such an application it would entirely abrogate the established rule that parol evidence is not admissible to contradict or vary a written contract."

The results in these and similar cases, when taken as final determinations of the controversies involved, were disappointing, and it must not be regarded as surprising that courts, in their endeavor to promote essential justice, should have felt impelled to make search for some principle of law, new in its essence or application, which might lead to more equitable solutions.

Conditions of fact, resembling those presented in the cases above cited, soon began to be greatly multiplied in insurance litigations. Underwriters, in their own interest, commonly introduced into their forms of policies many technical provisions covering a vast number of minute particulars, a compliance with every one of which was expressly made a condition precedent to any right of recovery under the policy. It became the custom, also, to set these forth in type so fine, that their purport could scarcely be deciphered without the aid of a magnifying glass. The owner of property had no part in framing the terms of his insurance contract which, indeed, for the most part, was a general printed form, not devised especially to fit any one particular case. The only alternative possible to the applicant for insurance was either to take what was offered by the company, or to go without insurance altogether.

Besides all this it became the practice in fire insurance, as well as in life, to require an applicant to sign a voluminous form of application paper, filled up in response to many detailed interrogatories, every answer to which was warranted by the terms of the contract to be exactly correct. No copy of this application was furnished to the insured,[5] who thus was often left in ignorance of the precise nature of the insurers' defense, until the full disclosure was made at the trial of the action brought on the policy, and then perhaps, owing to the short period of limitations prescribed, as, for instance, by the terms of the usual fire policy, the last day had expired for seeking relief by equitable form of procedure.

The courts could not altogether ignore the fact that the stringent doctrine of warranties became imbedded in the law of insurance in connection with the marine policy, the conventional form of which contained few conditions and restrictions in favor of the underwriters, and with the terms of which mercantile men, employing it, were perfectly familiar. So also the earliest forms

[5]Statutes in certain states later intervened to the effect that a copy must be furnished or else the application could not be construed as part of the contract.

of fire insurance policies were often comparatively simple, and, like the marine policy, were occupied mainly with statements of what the underwriters undertook, not what they declined to undertake.[6]

In view of such considerations as these it gradually came about that the majority of the American state courts in dealing with actions brought upon modern forms of fire, as well as life insurance, policies saw fit to adopt the doctrine known as "parol waivers."[7] The purpose was obvious. The intention of the courts was to prevent what amounted to a fraud. It was deemed intolerable that an insurance company should be allowed to collect a premium, and, in return, deliver, not an insurance, but a piece of paper known from the outset to be worthless.[8] If the company, through its agent, treated the contract as operative in favor of itself, it must treat it as operative in favor of the insured, and, for what the agent of the company did and knew in the course of his employment, the company must be held responsible. That was the line of argument.[9]

It must be conceded that the rigorous doctrine of warranties, inherited from the early law of marine insurance, often furnished the fire and life insurer with technical and unconscionable defenses. Nor can it be denied that the situation imperatively called for the adoption of some form of remedial action in the interest of the insured public. The question remains, however,

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[6]One of the early fire insurance policies underwritten in Connecticut was policy No. 2, a valued policy, signed Feb. 8, 1794, by the partnership of Sanford & Wadsworth. This policy required the insured to give a mere notice of the fact of a loss, but no proofs or particulars of any sort whatsoever. To arrive at the amount of loss payable, salvage and two and one-half per cent. were to be deducted from the total sum named. Losses below five per cent. were not to be recognized. All differences were to be arbitrated. The policy contained no other restrictions or conditions or warranties of any kind in favor of the underwriters.

[7]German Ins. Co. *v.* Shader (1903) 68 Neb. 1, 93 N. W. 972, 60 L. R. A. 918 (citing decisions from many states). The courts of Massachusetts and New Jersey adhered more closely to common law rules of evidence, Thomas *v.* Commercial Union Assur. Co. (1894) 162 Mass. 29; Martin *v.* Ins. Co. (1895) 57 N. J. L. 623, 31 At. 213; Dewees *v.* Manhattan Ins. Co. (1872) 35 N. J. L. 366.

[8]Van Schoick *v.* Ins. Co. (1877) 68 N. Y. 434.

[9]Alabama State Mutual Assurance Company *v.* Long, etc., Co. (1898) 123 Ala. 667, 26 So. 655; Kiernan *v.* Dutchess Co. Mut. Ins. Co. (1896) 150 N. Y. 190, 44 N. E. 690; the Wisconsin court while admitting that the doctrine of waiver or estoppel by means of parol testimony is exceptionally peculiar to insurance does not feel warranted "in seriously questioning the wisdom of it," Welch *v.* Fire Association (1904) 120 Wis. 456, 468, 98 N. W. 227.

whether the doctrine of parol waiver is altogether consonant with sound and well tested principles of law and whether this compensatory offset in favor of the insured provides the wisest form of available relief.

In facing this question it is well to scrutinize the doctrine in practical operation. The usual fire policy[10] provides that the policy shall be void if the insured is not the unconditional and sole owner of the subject matter of insurance,[11] or if he has other insurance,[12] or if he uses certain hazardous articles,[13] or if the insured building stands on leased ground,[14] or if the insured personal property is covered by a chattel mortgage,[15] without written consent or permit endorsed on the policy. It is shown that no such consent is endorsed. It is further proved in each case that the particular condition of the policy, called in question, has not been complied with by the insured, and, consequently, that a forfeiture under the written terms of the policy has undoubtedly been incurred by the insured. Nevertheless, by virtue of this doctrine of parol waiver, the insured is allowed to testify, on the trial of the action brought to recover the insurance money, that the agent of the company, when he delivered the policy or accepted the premium, had knowledge of the facts constituting the breach of contract. The witnesses for the defendant absolutely deny any such knowledge, and stoutly maintain that they relied implicitly upon the contract as written, but the issue goes to the jury who decide for the claimant without very much regard to the weight of evidence. Although a warranty has been broken, the court evades a forfeiture by indulging in the inference, or legal fiction, that the parties intended to omit, or ignore, the written condition, or add to the contract the appropriate written consent.[16]

Evidently the effect of the successful application of this doctrine is virtually to expunge from the policy many of its substantial provisions, or to read into the policy the corresponding

[10]Massachusetts policy and a few others differ.

[11]Virginia F. & M. Ins. Co. *v.* Richmond Mica Co. (1904) 102 Va. 429, 46 S. E. 463, 102 Am. St. R. 846.

[12]Swain *v.* Macon Fire Ins. Co. (1897) 102 Ga. 96, 29 S. E. 147.

[13]Hartley *v.* Penn. Fire Ins. Co. (1904) 91 Minn. 382, 98 N. W. 198, 103 Am. St. R. 512.

[14]Bergeron *v.* Pamlico Ins., etc., Co. (1892) 111 N. C. 45, 15 S. E. 883.

[15]Robbins *v.* Springfield F. Ins. Co. (1896) 149 N. Y. 477, 44 N. E. 159.

[16]Forward *v.* Continental Ins. Co. (1894) 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637.

permits.[17] By oral evidence, then, offered in a common law action on the policy, the tenor and legal import of the written instrument are radically changed. The oral version of some witness is taken as a controlling substitute in place of the plain and unambiguous provision of the written contract itself. The jury, acting upon testimony parol in its character, and usually disputed, although not governed by the rules of law which must be observed by a chancellor sitting in an equity case for reformation, are allowed, in substance, to reform the contract; and, sometimes in practice more than that, to give the plaintiff a recovery, if they think he is equitably entitled to it, regardless of any question of breach of warranty.

Having applied this doctrine to transactions between the insured and local agents of the insurer with authority to countersign and issue policies, several of the courts advanced a step further, and held it equally applicable in dealings between the insured and a sub-agent, or even a clerk of the general agent, sometimes on the theory that the agent with more limited powers was in fact acting as a substitute for the general agent,[18] and sometimes rather on the theory that notice to any agent in the course of his employment, however humble, is notice to the principal.[19]

The following may be given as a typical instance of what frequently occurred in practice. The insured has violated a warranty contained in his policy, for example, the warranty against other insurance without written consent. On this point there is no issue for the jury, for the policy, upon which action is brought, shows on its face that no permit or endorsement of consent has been made. The other policy, also, is put in evidence, and speaks for itself. The local agent of the company, who received the application for insurance and issued the policy in suit, testifies that he had no information whatsoever of the existence of any other insurance. The plaintiff thereupon to save his case, and avoid the established forfeiture, is permitted to take the witness stand, and state orally that he recalls dropping in at the office of the company, or at the agency, and mentioning to some gentleman in charge there, whose name perhaps he does not remember, that he had other insurance, and the plaintiff distinctly recollects re-

[17]Northern Assur. Co. *v.* Grand View Building Assoc. (1901) 183 U. S. 308, 46 L. Ed. 213.

[18]Arff *v.* Star Fire Ins. Co. (1890) 125 N. Y. 57, 25 N. E. 1073, 21 Am. St. R. 721, 10 L. R. A. 609.

[19]Merchant's Mut. Fire Ins. Co. *v.* Harris (Colo. 1911) 116 Pac. 143.

ceiving a reply to the effect that it was "all right," and that the other insurance made no difference. In the majority of instances, probably, the contract as written contains the more accurate record of the real agreement of the parties, but the average juryman entertains a prejudice against insurance corporations, and is reluctant to give a verdict against the insured.

Finding themselves almost at the mercy of forgetful and unscrupulous claimants, the insurance companies at an early date, introduced into their policies an express provision to the effect that the terms of the policy as written could not be waived or altered except by written agreement. But this additional stipulation brought little relief to the insurers, since the courts promptly held that this clause could itself be waived, equally and in like manner with the warranties of the policy.[20]

Thereafter the ingenious phraseology of the New York and other standard policies was devised, to the effect that no officer or agent of the insurer had *authority* to waive orally. This clause was based upon the theory that the insured could not seek shelter under the doctrine of parol waiver, until he could affirmatively establish one or the other of two propositions, either that the agents had received express instructions to waive orally, or else had an apparent authority to waive in that manner. Rarely can the insured find evidence of express instructions of such a character, and the framers of the standard policy believed that he would also fail in proving an apparent authority, since the terms of the standard policy itself negatived such an inference, and gave explicit notice to the insured, in the form of a stipulation between the parties, that no agent possessed any power whatsoever to alter the contract, except by written agreement, endorsed on the policy or attached thereto.

But to a considerable extent the majority of the state courts have nullified the intended effect of this clause also. Some have in substance taken the position that a countersigning agent possesses, as a necessary incident to the conduct of the business of closing the contract, sufficient power to dispense with written permits and to make oral waivers.[21] In aid of this mooted view, the sound argument is invoked that the extent of authority vested in an agent, whether to be regarded as matter of fact or matter of

[20]Weed *v.* London & Lan. Fire Ins. Co. (1889) 106 N. Y. 117, 22 N. E. 229.

[21]Beebe *v.* Ohio F. Ins. Co. (1892) 93 Mich. 514, 53 N. W. 818, 18 L. R. A. 481 n., 32 Am. St. R. 519; Home Ins. Co. *v.* Gibson (1894) 72 Miss. 58, 17 So. 13.

law, involves a relationship created in no wise by the terms of the policy—a relationship governed partly by actual instructions passing between the principal and agent, and partly by the nature of the business entrusted to the agent; and that, therefore, if an authority in the agent really exists, it cannot be nullified or diminished by policy stipulations to which the agent is not a party.[22] These stipulations regarding lack of authority, it is said, are not to be construed as agreements between the insurers and the insured so much as notices or recitals, which are not conclusive unless true, and not operative as notices until after the policy containing them has been actually delivered to the insured.[23]

Thus in the final analysis it will appear that this controversy, so long and so earnestly waged in the courts, turns largely upon the answer to the following question: what is the actual authority of the agent relating to oral waivers? Usually at the trial there is very little direct testimony on this point.[24] Shall the court then presume that the policy stipulation regarding lack of authority to waive orally contains the true recital,[25] or shall the court, in spite of the policy stipulation, presume that a countersigning agent by virtue of the character of his office has authority to waive orally?[26]

In New York and in many states, this policy restriction upon the authority of the agent is respected as to subsequent parol waivers, that is, as applied to transactions occurring after the policy is delivered.[27] But, on the other hand, the New York, and the majority of the state, courts have continued to enforce

[22]Knights Pythias *v.* Withers (1899) 177 U. S. 260.

[23]Kausal *v.* Ins. Co. (1883) 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776. This argument is considerably weakened by the universal and long continued use of a stereotyped and statutory form of policy, with the essential terms of which the public must be supposed to have some familiarity, and a leading object of which was to do away with parol waivers, Moore *v.* Hanover Fire Ins. Co. (1894) 141 N. Y. 219, 36 N. E. 191.

[24]Sometimes authority can be proved by showing previous course of business by the agent ratified by the company. Ins. Co. *v.* Norton (1877) 96 U. S. 234. Sometimes by direct evidence of authority. Continental Fire Ins. Co. *v.* Brooks (1901) 131 Ala. 614, 30 So. 876.

[25]Northern Assur. Co. *v.* Grand View Building Assoc. (1901) 183 U. S. 308, 46 L. Ed. 213.

[26]Western Assur. Co. *v.* Phelps (1900) 77 Miss. 625, 640, 27 So. 745. Brannon, J., says: "Upon this subject of the power of the agents to waive conditions—there is a world of decisions, and they are a wilderness of conflicting cases." Maupin *v.* Ins. Co. (1903) 53 W. Va. 557, 562, 45 S. E. 1003.

[27]Northam *v.* Dutchess Co. Ins. Co. (1901) 166 N. Y. 319, 59 N. E. 912, 82 Am. St. R. 655; Parker *v.* Rochester German Ins. Co. (1895) 162 Mass. 479, 39 N. E. 179; Straker *v.* Phenix Ins. Co. (1898) 101 Wis. 413, 77 N. W. 752.

the doctrine that if the countersigning agent, when he issues a policy, has knowledge of facts constituting a forfeiture, the company will be held to have waived the breach.[28]

In 1901, in a case of conspicuous importance, the United States Supreme Court elaborately reviewed this whole subject, and, with three justices dissenting, decided that the majority of the state courts have seriously erred in thus departing from well established canons of the common law relating to evidence.[29] In that case the warranty against other insurance without written consent had been broken. The assured was allowed to testify that the countersigning agent had been informed of the other insurance. In consequence of this parol testimony a waiver was found, and the judgment in favor of the plaintiff was affirmed by the Court of Appeals. The highest court, however, reversed, concluding that a fundamental rule of evidence had been disregarded, and that under the terms and provisions of the New York standard fire policy it was error to receive the parol testimony mentioned.[30]

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[28]Lewis *v.* Guardian Fire Ins. Co. (1905) 181 N. Y. 392, 74 N. E. 224; Leisen *v.* St. Paul F. & St. Ins. Co. (N. Dak. 1910) 127 N. W. 837 (citing many cases). It has recently been declared that the New York courts "are anchored to the proposition." Wisotzkey *v.* Niagara F. Ins. Co. (N. Y. 1906) 112 App. Div. 599, 602.

[29]Northern Assur. Co. *v.* Grand View Building Assoc. (1901) 183 U. S. 308, 46 L. Ed. 213.

[30]In the course of a very elaborate opinion, Justice Shiras, among other things, has this to say: "What, then, are the principles sustained by the authorities, and applicable to the case in hand? They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by endorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing endorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned

In the highest and in the lower federal courts, this case has since been frequently cited with approval. Nevertheless, with the federal court decision before them many of the state courts continue to adhere to the contrary view.[31]

The sequel to this case is most suggestive. After being defeated by the U. S. Supreme Court in the action on the policy, as just explained, the plaintiff instituted, in the state court of Nebraska, another action to so reform the policy as to permit other insurance, because of the agent's knowledge. In this form of procedure he was altogether successful in the state court,[32] and his judgment was left undisturbed by the United States Supreme Court.[33] The interesting history of this litigation gives force to the argument that in all these many cases, where, in actions at law upon the policy, it is sought by the plaintiff, by means of oral testimony, to establish that the understanding of the parties was different from the plain terms of the policy or written contract, it would be wiser and more consonant with sound law to relegate the plaintiff to the equity branch of the court.[34] To be sure, it is only in cases of fraud or mutual mistake that a reformation is decreed, but this reasonable rule should be as applicable to insurance contracts as to any others, and it is avowedly to prevent fraud that the doctrine of parol waivers has been adopted.[35] It is true that a reformation of the contract is not to be allowed, unless the evidence in support of it is "clear, unequivocal and convincing."[36] But here again, the general rule in equity is quite as appropriate in connection with insurance policies as in other

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the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent." Northern Assur. Co. *v.* Grand View Building Assoc. *supra* 361.

[31]For example see, Athens Mut. Ins. Co. *v.* O'Keefe (1909) 133 Ga. 792, 66 S. E. 1093; Chismore *v.* Anchor Fire Ins. Co. (1906) 131 Iowa 180, 108 N. W. 230; Leisen *v.* St. Paul F. & M. Ins. Co. (N. Dak. 1910) 127 N. W. 837; American Cent. Ins. Co. *v.* Chancey (Tex. 1910) 127 S. W. 57; *contra,* besides Massachusetts and New Jersey, Ohio Farmers Ins. Co. *v.* Titus (1910) 82 Ohio St. 161, 92 N. E. 82; State Mut. Ins. Co. *v.* Craig (1910) 27 Okla. 90, 111 Pac. 325.

[32]73 Neb. 149, 102 N. W. 246.

[33]203 U. S. 106, 27 S. Ct. 27, 51 L. Ed. 109.

[34]For a fuller presentation, see Richards, Insurance (3rd ed.) § 174.

[35]Security Ins. Co. *v.* Fay (1871) 22 Mich. 467, 473, 7 Am. Rep. 670; Russell *v.* Prudential Ins. Co. (1903) 176 N. Y. 178, 68 N. E. 252, 98 Am. St. R. 656.

[36]U. S. *v.* Budd (1891) 144 U. S. 154.

cases. In most of the states, an equity case can very promptly be brought to trial, and, in most of the controversies arising between insurers and insured, a judge will be found far less prejudiced than a jury. It would seem that the unscrupulous claimant, more frequently than the conscientious, is able to take advantage of the doctrine of waiver and estoppel; and, certain it is, that by the novel application of this doctrine to the law of insurance in the American state courts great confusion has been occasioned in an already difficult branch of the law. Fire losses, whether honestly or dishonestly incurred, must ultimately be paid for by the insured public. The terms of a uniform contract, established by statute, should be observed by all alike. A strict compliance with the provisions of the New York fire policy is in the line of protection against fire and against fraud. In this result the public are interested.

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